No. 3112

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITY OF SEATTLE, a Municipal Corporation,
Plaintiff in Error,

vs.

LLOYDS PLATE GLASS INSURANCE COMPANY, a Corporation,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR

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INDEX

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POINTS AND AUTHORITIES

Page

Statement 1
Argument 5
Claims filed were sufficient 5
Fireman's Fund Ins. Co. v. Oregon-Washington R. R. & Nav. Co., 58 Wash. 332 7
Palmer v. Oregon-Washington R. R. & Nav. Co., 208 Fed. 666 7
Hase v. Seattle, 51 Wash. 174, 180 9
James v. Seattle, 68 Wash. 359 9
Falldin v. Seattle, 50 Wash. 561 10
Walters v. Seattle, 97 Wash. 657 10
Haynes v. Seattle, 83 Wash. 51 (Distinguished) 11
Section 39 of Ordinance No. 34379 provides that dynamite must be stored at the powder dock 12
(a) Section 7 of the Ordinance 13
(b) Section 33 of the Ordinance 15
(c) Section 38 of the Ordinance 15
Storage of explosives at a place forbidden by ordinance creates a nuisance per se 22
Hazard Powder Co. v. Volger, 58 Fed. 152 23
Laflin-Rand Powder Co. v. Tearney, 131 Ill. 322 23
Texas Co. v. Fisk, 129 S. W. 188 24
Kelsey v. Chicago R. R. Co., 81 N. E. 522 24
Blanc v. Murray, 36 La. Ann. 162 24
McAndrews v. Collerd, 42 N. J. L. 189 24
Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312 24
Flannagan v. Bloomington, 156 Ill. App. 162 24
Ricker v. McDonald, 85 N. Y. S. 825 24
Walker v. City of New York, 95 N. Y. S. 121 24
It is immaterial that the City did not own either the barge or the dynamite 24
Kolb v. Mayor of Knoxville, 111 Tenn. 311 25
Cohen v. New York, 113 N. Y. 532 25
Speir v. Brooklyn, 18 N. Y. S. 170 (Affirmed, 139 N. Y. 6) 25

Page

McDonald v. City of Newark, 42 N. J. Eq. 136 25
Fitzgerald v. Town of Sharon, 143 Iowa, 730 25
Pinson v. Young, 164 Pac. 1102 26

City is not exempt from liability when it maintains or authorizes the maintenance of a nuisance 26

Hargrave's Law Tracts, par. 2, p. 85 28
Bernstein v. City of Milwaukee, 158 Wis. 576, 149 N. W. 382 28
Walker v. City of New York, 107 App. Div. 351, 95 N. Y. S. 121 29
Hart v. Board of Chosen Freeholders of Union County, 57 N. J. L. 90 29
Hughes v. City of Fond du Lac, 73 Wis. 381; 41 N. W. 407 29
Weet v. Trustees, 16 N. Y. 161 29
Mayor, etc., v. Furze, 3 Hill 612 29
Fitzgerald v. Town of Sharon, 143 Iowa 730 30
Bruhnke v. La Crosse, 155 Wis. 485; 144 N. W. 1100 30
Hines v. City of Rocky Mount, 162 N. C. 409; 78 S. E. 510 31
Markwardt v. Guthrie, 18 Okla. 32; 90 Pac. 26 31
Jacobs v. City of Seattle, 93 Wash. 171; 160 Pac. 299 31
Harpers v. City of Milwaukee, 30 Wis. 365 31
City of New Albany v. Slider, 52 N. E. 626 31
Gordon v. Village of Silver Creek, 127 App. Div. 888; 112 N. Y. S. 54 (Affirmed, 90 N. E. 1159) 31
Seifert v. City of Brooklyn, 101 N. Y. 136 31
Nashville v. Mason, 137 Tenn. 169; 192 S. W. 915 31
Winchell v. City of Waukesha, 110 Wis. 101; 85 N. W. 668 31
Clayton v. City of Henderson, 20 Ky. Law Rep. 87; 44 S. W. 667 31
Hines v. City of Nevada, 150 Iowa 620; 130 N. W. 181 31
Jones v. Town of North Wilkesboro, 150 N. C. 646; 64 S. E. 866 31
Garrett on Nuisances (3rd ed.) p. 131 31
McQuillin on Municipal Corporations, §2641, p. 5449, and cases cited 31
(a) Kitsap County Transportation Co. v. Seattle, 75 Wash. 673 (Distinguished) 31

Page

(b) The cases of Zywicki v. Jos. R. Foard Co., 206 Fed. 975; Foard v. Maryland, 213 Fed. 53, 219 Fed. 827; Gutowski v. Baltimore, 127 Md. 502, 96 Atl. 630; and Fowle v. Alexandria, 3 Pet. 398, explained 34

The City in maintaining Buoy No. 1 and charging fees for its use was acting in its proprietary capacity 38

Wisconsin Tele. Co. v. Milwaukee, 126 Wis. 1; 1 L. R. A. (N. S.) 581, 587 39

No Act of Congress is herein involved 39

The Ingrid, 195 Fed. 596; 216 Fed. 72 41

The trial court found that the dynamite was in storage 44

Jolivet v. Seattle, 226 Fed. 963 (Record, p. 83) 44

The trial court found that Buoy No. 1 was in fact an improper place to store dynamite 45

Heeg v. Licht, 80 N. Y. 579 46

Wier's Appeal, 74 Penna. 230 46

State ex rel. Hopkins v. Excelsior Powder Mfg. Co., 259 Mo. 254; 169 S. W. 267 46

Henderson v. Sullivan, 159 Fed. 46; 16 L. R. A. (N. S.) 691 46

Schnitzer v. Excelsior Powder Mfg. Co., 160 S. W. 282 46

Melker v. City of New York, 190 N. Y. 481; 83 N. E. 565 46

Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413; 21 S. E. 1035; 52 Am. St. Rep. 890 46

Cheatham v. Shearon, 1 Swan. (Tenn.) 213; 55 Am. Dec. 734 47

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STATEMENT.

We are not satisfied with the statement made in the brief of the plaintiff in error, for the reason that it contains assertions of alleged facts concerning which there is no testimony in the record,

and omits facts vital to a correct determination of the case. We, therefore, make the following statement:

On March 1, 1915, the City Council of the City of Seattle passed Ordinance No. 34379, which, among other things, provided:

> "Section 39. The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, *and for use exclusively* for the *handling* of *powder, dynamite* and other *like explosives,* and as a *place* for *vessels* carrying as cargo, or part cargo, *such* explosives. Any vessel shall be allowed to lie at said pier only after a written permit shall have been issued by the port warden." (Italics ours.) (Record, p. 58.)

This ordinance was approved by the Mayor, published on March 12th, and thereupon became a valid ordinance of the city. Some time thereafter, the Hercules Powder Company shipped from San Francisco to Seattle, on the Steamer "F. S. Loop," fifteen tons of dynamite. Just when the dynamite arrived in Seattle, the evidence does not disclose. At any rate, the dynamite was, some time after its arrival in Seattle, transferred to a barge chartered by the Lillico Launch & Tug Boat Company, and on May 14th the barge containing this dynamite was moored to Buoy No. 1. This buoy was owned and maintained by the City of Seattle, and was located within the city limits of Seattle and in that part of the harbor of the City of Seattle known and designated as the "Elliott Bay Anchorage." On the following morning, the Port Warden of the

City of Seattle, in consideration of the payment of a fee of one dollar per day, issued a permit to the Lillico Launch & Tug Boat Company to moor this barge to Buoy No. 1. At the time of the issuance of this permit, he knew that the scow had on board the fifteen tons of dynamite. (Record, p. 44.)

The Port Warden testified that he was *informed* that this dynamite was to be transported to Vladivostok, Russia, by a Japanese steamship, but that such steamship sailed from Seattle about a week after the dynamite had been transferred from the "Loop" to the scow. (Record, p. 48.) Whether the Japanese steamship sailed before the barge was moored to Buoy No. 1, the evidence does not disclose. The Port Warden further testified that for some reason the steamship could not take the dynamite, and that after its failure to transport the dynamite, it was arranged that the Steamship "Robert Dollar," which was to sail on May 31st, should carry it. However that may be, the fact is that the barge with the dynamite on board was moored to Buoy No. 1 from May *14th* until about two o'clock on the morning of May *30th,* at which time the dynamite exploded.

The force of the explosion was so great that windows were broken in Tacoma, Hillman City and in Everett (Record, pp. 34, 35), and a scow containing 250 tons of coal which had been moored alongside the barge of dynamite on May 28th or 29th, was turned over. (Record, p. 45. *Jolivet v.*

City of Seattle, 226 Fed. 963.) Many thousand dollars worth of plate glass was broken in Seattle. Indeed, so much glass was broken that the glass market became demoralized and it was not possible to replace all the glass until December, 1915. The Port Warden testified that he saw glass on the street in the Pike Street district and all the way down until he got to Pier 1. (Record, p. 46.) Reference to the map attached to the bill of exceptions will disclose that the broken glass seen by the Port Warden must have covered an area at least a mile and a half long.

At the time of the explosion, the Lloyds Plate Glass Insurance Company, a New York corporation, and the Globe Indemnity Company, also a New York corporation, had in force policies of insurance on various windows in the down-town district of the City of Seattle. After the explosion, these two insurance companies replaced the broken glass covered by the policies issued by them, and thereafter filed claims with the City of Seattle, as provided by the City Charter, for the damage which they had sustained by reason of this explosion. The City Council rejected these claims. The Globe Indemnity Company then assigned its cause of action to the defendant in error, and thereupon suit was brought. The case was tried before the Honorable E. E. Cushman sitting without a jury, and at the conclusion of the testimony he rendered an oral opinion holding the City liable. (Record, p. 83.)

ARGUMENT.

The Claims Filed Were Sufficient.

The first contention made by the City is that the claims filed by the insurance companies with the City of Seattle were erroneously admitted in evidence, in that the claims were not filed and verified by the property owners but by the insurance companies. At the outset, let us say that we agree that Section 29 of the City Charter and Section 7995 of Remington & Ballinger's Code are the applicable provisions of law. We also agree that the filing of a claim is a condition precedent to the right to maintain a suit against the City.

Collins v. Spokane, 64 Wash. 153, 157.

The real question for solution here, however, is: What is the meaning of the word "claimant" as used in the charter provision and statute? Counsel for the City insists that the word "claimant" means the person who sustained damage to his property, and that in this case the only person who could have sustained any damage to his property was the owner of the glass which was broken. We assert that under the circumstances of this case the owner of the cause of action is the claimant within the meaning of the law, rather than one who has no interest whatsoever in such cause of action; and that the only persons or corporations who had a cause of action against the City for the loss here sought to be recovered were the insurance

companies. It will be remembered that the explosion occurred at two o'clock on Sunday morning. The glass covered by the insurance policies was, for the most part, the glass fronts of the stores in the business portion of the City of Seattle. That this is true is readily apparent, not only from the testimony of Mr. Paysse, but from an examination of the claims themselves. For instance, in one of the claims filed by the Globe Indemnity Company, the glass broken, as shown by the bill attached to the claim, was as follows:

"One plate 88x105
One plate 85x120
One plate 63x80½
One plate 80½x102"

These particular windows were situated in the store building of Frank McDermott, at 1612-14-16 Third Avenue. (Record, pp. 98, 105.) Now, it is obvious that these windows had to be replaced as soon as possible. The insurance company had the right, under the terms of its policy, either to pay the value of the glass broken or replace the windows themselves. The insurance company exercised its option and replaced the glass. When the insurance company replaced the glass, what claim did the owner of the glass have against the City of Seattle or any one else? And will it be argued that the property owner, in defiance of the provision of the insurance policy which gave to the insurance company the option either to pay the value of or replace the glass, should him-

self have replaced the glass and then filed a claim with the City? If the property owner pursued such a course, he could have had no recourse against the insurance company. Moreover, if these windows were not replaced promptly, abundant opportunity would have been given to thieves to steal the merchandise from the stores. The property owner would, therefore, desire immediate replacement. Suppose the glass was replaced on Sunday by the insurance company, how then could the property owner have filed a claim with the City of Seattle on Monday? We therefore think it apparent that the insurance companies, upon the replacement of the glass, became the real parties in interest.

In *Fireman's Fund Insurance Co. v. Oregon-Washington R. R. & Nav. Co.,* 58 Wash. 332, the Supreme Court of the State of Washington held that when it was shown that an insurance company had paid the amount of its policy in part settlement of a loss and the *tort feasor* had settled with the assured for the balance, the insurance company was the entire owner of the liability remaining. It is certain that this is equivalent to a holding that the only party in interest when an insurance company has fully paid the loss, is the insurance company itself.

Again, in *Palmer v. Oregon-Washington R. R. & Nav. Co.,* 208 Fed. 666, the court held that under the statute of the State of Washington an insurance company is, upon payment of a policy, subro-

gated by operation of law to the rights of the assured; and that in such case it is the real party in interest and can maintain an action in its own name against a third person whose act was the cause of the loss.

The defendant in error and the Globe Indemnity Company, upon the replacement of the glass, became then the entire owners of the liability against the City. They were the real parties in interest, and therefore the only persons who owned or could assert a claim. To contend otherwise is to assert an absurdity. Suppose, for instance, that the owner of property damaged dies within the thirty-day period. Then, under the doctrine now advanced by the City, the executor or administrator of the estate of the property owner so damaged could not file a claim against the City. The executor or administrator would not, under such circumstances, be the claimant within the City's definition of that word, for neither the executor nor the administrator would be the party immediately suffering the damage. Now, a subrogee, or an insurance company, stands in the same position as such an executor or administrator. An insurance company, like the executor or administrator, steps into the shoes of the original owner of the claim by operation of law as well as by contract, and certainly there is no rule of public policy to be subserved in depriving it or him of the rights thus acquired.

It is true that the City should be protected against fraudulent claims and given a fair oppor-

tunity to investigate or settle the claims made against it.

In *Hase v. Seattle,* 51 Wash. 174, 180, it is said that a provision requiring a claimant to give a present residence, might be held to be reasonable, for the reason that it would give the City authorities an opportunity to see the claimant, to talk with him, to ascertain something of his appearance, or to make advances toward settlement of his claim if deemed expedient; but that to require anything further would be unnecessary and savor somewhat of inquisitiveness.

In *James v. Seattle,* 68 Wash. 359, it appears that a Mrs. James was injured by reason of a defect in a sidewalk. She verified and presented a claim to the City. The City in that case contended that in view of the fact that the Supreme Court of the State of Washington had held in the case of *Hawkins v. Front St. Cable R. Co.,* 3 Wash. 592, that the husband was a necessary party plaintiff in an action brought to recover for personal injuries to his wife, a claim verified by the wife alone was insufficient. The Court, however, held that the wife was a proper party to such action. Continuing, the Court said:

> "Being a proper party, she is also a claimant; and since the charter does not require all the claimants to join in a claim, or specify which claimant shall verify the claim where there is more than one such claimant, it would seem to follow that both or either might properly verify it; and such has heretofore been the ruling of this court."

In *Falldin v. Seattle,* 50 Wash. 561, the Court, in discussing the sufficiency of a claim filed with the City of Seattle under the same charter provision now under discussion said:

> "This court has uniformly held that requirements of this kind must be reasonable, and that a reasonable compliance with such requirements was all that could be demanded."

See also:

Walters v. Seattle, 97 Wash. 657, 663.

Now, the claims filed in this case set forth everything which it was reasonable or necessary for the City to know in order that it might be protected against a fraudulent claim or to ascertain whether it desired to make advances towards settlement of the claims. There was set forth the cause of the breaking of the glass, the names of the owners of the glass, the place where the glass was situated, the number of windows broken, the value of the glass less salvage, and the residence for one year last past of each of the insurance companies. The claims also recite that the insurance companies replaced the glass under the provisions of the policies, and were therefore subrogated to the rights of the assured. In addition to that, the Globe Indemnity Company attached to the claims filed by it the bills of the glass companies replacing the glass, which bills set forth the description and size of the glass replaced, the value thereof, the cost of labor in replacing the glass and the amount of the salvage. What more could the City ask?

How could it be better protected? Did it not have all the opportunity in the world to ascertain whether or not these claims were fraudulent, or to make advances toward settlement if it desired? Moreover, the very fact that the insurance companies did, themselves, replace this glass would indicate to an ordinary man that the claims were not fraudulent, for insurance companies are not in the habit of paying fraudulent claims. Nor do we think it can be fairly argued that the insurance companies would conspire with the property owners to pay fraudulent claims for the purpose of subsequently suing the City for reimbursement.

The case of *Haynes v. Seattle,* 83 Wash. 51, cited by counsel for plaintiff in error, is not in point. Dora Haynes, the plaintiff in that case, was of full age when the accident happened. Her father verified and filed with the City Council a claim. No damage, of course, had been sustained by him. He was not the real party in interest. He was not even a proper party. He had, in fact, no legal interest whatever in the cause of action. He had no more right to verify and file a claim in behalf of Dora Haynes than anyone else.

The City, in Issuing a Permit for the Storage of the Dynamite at Buoy No. 1, Violated Its Own Ordinance, thereby Creating a Nuisance Per Se, and is Liable in Damages therefor.

Our first contention is, that the City, having for a consideration issued a permit to the agent of the

owner of the dynamite to store this dynamite on a barge moored to Buoy No. 1, violated Ordinance No. 34379 of the ordinances of the City of Seattle, and that the violation of this ordinance constituted a nuisance for which the City is liable in damages.

The Ordinance Requires That Dynamite Shall Be Stored at the Powder Dock.

An elaborate argument is made by counsel for the City to the effect that the trial judge erroneously construed this ordinance. The trial court's construction, however, is the correct one, as an analysis of the ordinance will demonstrate. Section 39 provides:

> "The Harrison Street municipal pier is hereby designated for use *temporarily* as a powder dock, and for use *exclusively* for the handling of powder, *dynamite* and other *like explosives,* and *as a place* for vessels carrying as cargo, or part cargo, *such explosives.* Any vessel shall be allowed to lie at said pier only after a written permit shall have been issued by the port warden." (Italics ours.)

This section says as plainly as the English language can make it, that the Harrison Street pier is to be used exclusively for the handling of dynamite and other like explosives, and as a place for vessels carrying as cargo or part cargo dynamite and like explosives. Counsel for the City, however, seek to interpolate certain words into Section 39 so that the Harrison Street pier should be construed as only one of the places where dynamite

might be stored or handled. In support of this construction, an elaborate analysis is made of the whole ordinance. Some of the sections analyzed are not material, others have been misinterpreted.

Sections 1, 2 and 4 we pass by, as they have no bearing on this case. It is insisted, however, that Section 7 of the ordinance (Record, p. 51) does have a most vital bearing upon the case. An examination of that section, however, will readily disclose that counsel has misinterpreted it and that properly interpreted it is wholly immaterial here. The first part of Section 7 provides that eight different bodies of water in Seattle Harbor shall be known as "fairway," and that they shall not be obstructed in any manner whereby navigation may be endangered or impaired. Continuing, Section 7 provides:

> "All navigable waters in the *projection* of *public streets, lying on the landward side of the outer harbor line* shall be *fairway.* It shall be unlawful for the master, or other person in charge of any vessel, to anchor, tie or make fast such vessel in any *such fairway* for a longer period of time than reasonably sufficient to load or unload the same, except that the port warden may, in his discretion, grant any permit for the use of any *such fairway* for a longer period of time whenever in his judgment such use will not interfere with the use of the fairway by any other vessel, but only upon the payment of the anchorage charges herein provided for." (Italics ours.)

Now, it is asserted in the brief of plaintiff in

error that this provision of Section 7 gives to the Port Warden the right to permit any vessel to lie at anchor in *any* fairway for such length of time as the Port Warden may prescribe. Obviously, however, such is not the case. The only discretion given to the Port Warden is to permit vessels to lie at anchor in only a certain limited number of fairways, that is, those fairways which are defined as being the navigable waters in projection of public streets and lying to the landward of the outer harbor line. For instance, the Port Warden has no power to grant a permit for a vessel to lie at anchor in the East and West Waterways. The East and West Waterways are defined by Section 7 as being fairways, but the Port Warden may not permit a vessel to anchor therein. Again, all of Elliott Bay lying east of a straight line drawn from Alki Point to West Point is denominated as fairway. There is reserved, however, a certain portion of this territory for anchorage grounds, and these anchorage grounds are not considered a part of what may be denominated the Elliott Bay fairway. The Port Warden does have the right to grant to certain vessels the right to anchor in Elliott Bay anchorage, but he has absolutely no right to grant any vessel the right to anchor for a single moment in Elliott Bay fairway. It will thus readily be seen that the wide and sweeping discretion which counsel for the City claims for the Port Warden is not possessed by him. As a matter of fact, the ordinance demonstrates that he

has a most limited discretion, and that his acts are rigidly defined and limited by the ordinance.

It is plain that the last paragraph of Section 7 above quoted has nothing to do with buoys, for there are no buoys in the fairways therein described. Nor is there anything in the language of the entire section which, even by inference, would permit dynamite to be stored in any of the bodies of water described in said section.

Sections 16 and 19 we pass by, as they are likewise immaterial.

Stress is laid upon Section 33. There is nothing in that section, however, which is in any way inconsistent with the trial court's construction of Section 39. Section 33 simply prescribes the conditions under which a vessel *entitled to moor to a buoy* may do so. It does *not* provide that every vessel may be attached to a buoy. It does *not* determine what vessels may be attached to a buoy. The argument which we make relative to various subdivisions of Section 38 applies with like force to Section 33.

We come, then, to Section 38 of the ordinance. In the brief of the City it is said that in construing an ordinance, the court should give effect to all of its provisions and that nothing should be added to or eliminated from the language of the ordinance, unless necessary to give sense to that which remains. Sections 38 and 39, therefore, must be construed together, and no change must be made in the wording of Section 39 unless absolutely necessary to

make it intelligible. If Sections 38 and 39 are construed together, it will not be necessary to interpolate any words in Section 39 in order to make that section perfectly clear.

We point out again that Section 39 provides that the Harrison Street municipal pier is designated for the time being as the powder dock, and that such pier is the only place where dynamite and like explosives may be handled or stored. Explosives other than dynamite and its like need not, however, be *handled* at the powder dock. They may be handled there, or, as we shall subsequently show, they may be transferred direct to a vessel on the day of its departure, and when the receiving vessel is lying at anchor in the harbor or moored to a buoy. Section 39, however, is the section, and the only one, which appoints a place for the handling and storing of dynamite. Section 38 does not attempt to appoint a place where dynamite may be handled or stored. Some of the subdivisions therein do relate to vessels carrying dynamite, but they do not prescribe *where such vessels may lie.*

With this distinction in mind, let us examine the subdivisions of Section 38 relied upon by counsel for the City. Subdivision 3 of Section 38 (Record, p. 55) provides in substance that "every vessel lying at any powder dock or at anchor within Seattle harbor which has a cargo or part cargo of dynamite, ignition caps, blasting or sporting powder, or other high explosives, or explosives in any

form, shall'' display certain signals. It will be noted that this subdivision is a provision relating to all vessels carrying explosives of any kind. It divides explosives into two kinds: (1) dynamite, ignition caps, blasting or sporting powder or other high explosives, and (2) explosives in any form. It then provides that all vessels, irrespective of the kinds of explosives on board, must display certain signals. It recognizes that these vessels will lie at different places, namely, that vessels carrying dynamite and explosives of like character will lie at the powder dock, and that vessels which carry explosives other than high explosives may lie at anchor in the bay. Vessels, however, carrying either kind of explosives must display the required signals. So construed, and this is the only proper construction of the subdivision, it is in entire harmony with Section 39, and words need not be interpolated in the last named section in order to make it intelligible. If it be thought that the word "any," preceding the words "powder dock" in the first line of said subdivision throws some doubt upon this construction, we point out that Section 39 appoints the Harrison Street municipal pier as the powder dock only temporarily. It was in contemplation, perhaps, that the powder dock would be changed later to some other pier either constructed or to be constructed. If such change were made, all the Council would have to do would be to amend Section 39, but would not have to change the language of Section 38. It is also very

probable that the Council had in mind that eventually there might be more than one pier in the City of Seattle designated as a powder dock. One thing, however, is certain; and that is, that on May 30, 1915, there was but one place designated as a powder dock.

Reliance is placed upon Subdivision 4 of Section 38 (Record, p. 55). That section provides that no person shall, on any pier or other structure except on the powder dock or on powder boats, store or have on hand for sale or sell or keep any powder, ignition caps, dynamite or other like explosives, either by day or night. The contention in regard to this section is that it shows that dynamite may be stored on powder boats, and it is assumed that powder boats carrying dynamite may lie at anchor in the harbor or be moored to a city buoy. An examination of the ordinance from beginning to end will disclose, however, that not once is any mention made of a powder boat being anchored in the harbor or moored to a buoy. The trial court, construing this subdivision, said:

> "Section 39 requiring powder boats to be kept at the Powder Dock—in order to cover the tow powder boats here mentioned beside the Powder Dock—it would be assumed that the powder boats in case the explosive was dynamite would be at the Powder Dock." (Record, pp. 85, 86.)

Counsel's misconstruction of this subdivision arises from his refusal to take into account that the ordinance makes a distinction between dyna-

mite and like explosives and explosives other than dynamite and its like. It is true that powder boats have the right to transfer ordinary explosives direct to vessels on the day of departure, and when such explosives are transferred the receiving vessel need not lie at the powder dock. Powder boats may not, however, transfer dynamite and its like to vessels lying at anchor in the harbor or moored to buoys, and powder boats may not, under any circumstances, be moored or anchored to a city buoy, and certainly not for seventeen days when containing a cargo of dynamite.

The trial court's construction of this subdivision and its kindred subdivisions is borne out by Subdivision 10 of Section 38, which provides that smoking is prohibited (1) on a powder dock, (2) on every vessel lying thereat, (3) on every vessel to which explosives are being transferred and on the powder boat engaged in such transfer. This subdivision recognizes the right of powder boats to transfer *ordinary* explosives to a vessel on the day of the vessel's departure, and that in such case the receiving vessel need not lie at the powder dock. Smoking is prohibited, both upon the powder boat transferring the explosive, and on the vessel receiving the same. Protection against smoking on vessels carrying dynamite and like explosives is provided for by the first half of the subdivision, which recites that smoking is absolutely prohibited on the powder dock and on the vessels lying thereat.

Counsel's chief contention, however, is that Subdivision 11 of Section 38 (Record, p. 57) permits the storage of dynamite on board a boat lying at a city buoy. What we have just said refutes this idea, but at the risk of tediousness we will re-state our proposition. Subdivision 11 provides that every vessel carrying a cargo of explosives in any form while lying at anchor or at a city buoy or alongside the powder dock, shall at all times have on board a competent crew and shall display the required signals and be ready to move when emergency requires. We are of the opinion that the phrase "explosives in any form" includes dynamite, but it does not follow that this subdivision gives the right to a vessel carrying a cargo of dynamite to lie at anchor in the harbor or to be attached to a city buoy. The purpose of this subdivision is to require all boats carrying explosives of any kind to have a crew on board, etc. The proper construction of this subdivision, then, is that those vessels which have on board explosives other than dynamite and its like may lie at a buoy or at anchor in the harbor. They must, however, observe certain precautions. Those vessels which have on board dynamite and its like must lie at the powder dock, but at the same time they must observe the same precautions. In other words, it is not the purpose of this subdivision to designate the places at which boats carrying the different kinds of explosives may lie, but to require that boats having on board explosives must carry a sufficient crew,

display the required signals and be ready to move when emergency requires.

The ordinance, therefore, is clear and unambiguous. It prohibits the handling and storing of dynamite at any place other than at the Harrison Street municipal pier. There is, therefore, no occasion for the invocation of the rule that when a law is ambiguous the long settled and uniform construction of it by those encharged with its enforcement is entitled to weight. Moreover, we do not think that rule has any application here. The ordinance was passed on March 12, 1915, and two months and two days later the Port Warden issued the permit to the Lillico Launch & Tug Boat Company. This does not constitute a long settled and uniform construction of the law by those empowered to enforce it. The cases cited by counsel, and all others which can be found, will demonstrate that in order to have such construction entitled to any weight, it must have been of long continuance. For instance, in the case of *United States v. McDaniel*, 7 Peters 1, the law had received a uniform construction over a period of twenty-five years.

In *Edwards, Lessee, v. Darby*, 12 Wheat. 206, the statute there under consideration had received a uniform construction for over thirty-five years, and, in addition, that construction had been especially approved by the legislature of North Carolina.

In *Brown v. United States*, 113 U. S. 568, a uni-

form construction had been placed upon the Act of Congress, there in question, for more than twenty years, and such construction was placed thereon by the President and the Navy Department.

Furthermore, in all cases in which this rule has been invoked, the officer in charge of the enforcement of the law has been either the President of the United States or one of the great Cabinet Ministers of the Federal Government, or one of the heads of the departments of a State. These officers, it is true, do devise policies and promulgate rules. They are necessarily invested with a wide discretion. The construction placed by such officers over a long period of time upon the law under which they are acting may be entitled to considerable weight, but it is a far cry from officers of such dignity to a town marshal or a port warden. Counsel for plaintiff in error, it seems to us, is going as far afield to place an erroneous construction on this ordinance as was the Roman lawyer who, having been employed to obtain the possession of three goats, said nothing concerning them in his argument, but dilated on *"Cannas Mithridaticumque bellum et perfuria Punici furoris et Sullas Mariosque Muciosque."* (Martial, Book VI, p. 269.)

The Storage of Explosives at a Place Forbidden by Ordinance Creates a Nuisance Per Se.

We assert, and we do not think the City will deny, that when a dangerous instrumentality such as dynamite is kept or stored at a place or in a

manner forbidden by statute or ordinance, a nuisance *per se* is created, for the proximate results of which the maintainer is responsible.

In *Hazard Powder Co. v. Volger,* 58 Fed. 152, 156, the court said:

> "The maintenance by the defendant of a powder magazine, containing a large quantity of powder, within the city limits, *in violation of the city ordinance,* was a nuisance which rendered the defendant liable for the injury resulting to the plaintiff from its explosion. It is no defense to such an action that the magazine was properly constructed and the powder carefully stored therein, and that the explosion was due to no personal negligence of the defendant or its agents. It is liable for the injuries resulting from its explosion from any cause, because *its location under the ordinance made it a nuisance.*" (Italics ours.)

In *Laflin-Rand Powder Co. v. Tearney,* 131 Ill. 322, the Supreme Court of Illinois said:

> "The ordinance absolutely prohibited any powder magazine from being kept within the town, unless the lot upon which it was located should be of a certain size. The defendant kept its magazine within the town upon a smaller lot than the law required. Its magazine was in the town, in violation of the law. The keeping of gunpowder in the town was an illegal act. 'If an illegal act be done, the party doing or causing the act to be done is responsible for all consequences resulting from the act.' Burton v. McClellan, 2 Scam. 434. The cases referred to by counsel as holding a contrary doctrine have no aplication here. In those cases it is held that, where the plaintiff's right of recovery depends upon his own exercise of due care, as well as upon the defend-

ant's negligence, the failure of the defendant to comply with some statutory requirement, such as ringing a bell, or blowing a whistle, or erecting a sign-board, will not of itself authorize a recovery, in the absence of such care on the part of the plaintiff. There the injury is attributable to the plaintiff's want of ordinary care, and the defendant's neglect of a statutory requirement cannot be set up as an excuse. Here there is no question of the exercise of care by the plaintiff, nor is it a mere matter of non-feasance on the part of the defendant. In keeping a powder magazine in the town without complying with the condition named in the ordinance, the defendant was guilty of malfeasance."

Of the innumerable other cases which have sustained this doctrine, we cite only:

Texas Co. v. Fisk, 129 S. W. 188.
Kelsey v. Chicago R. R. Co., 81 N. E. 522.
Blanc v. Murray, 36 La. Ann. 162.
McAndrews v. Collerd, 42 N. J. Law 189.
Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312.
Flannagan v. Bloomington, 156 Ill. App. 162.
Ricker v. McDonald, 85 N. Y. Sup. 825.
Walker v. City of New York, 95 N. Y. Sup. 121.

It is Immaterial that the City did not Own either the Barge or the Dynamite.

It is argued that the City itself did not store the dynamite at Buoy No. 1, and therefore is not liable. (Appellant's Brief, pp. 44, 45.) Now, it is true that mere knowledge on the part of the City that a nuisance was being maintained would not render

it liable; but the complaint alleges, and the proof shows, that the City for a consideration issued a permit to Lillico Company to moor its barge to the City's buoy and that at the time of the issuance of such permit the Port Warden knew that the barge had on board fifteen tons of dynamite. Under these facts, a case of participation in the maintenance of a nuisance is made out against the City.

In *Kolb v. Mayor of Knoxville,* 111 Tenn. 311, the court said:

> "It is insisted that the city is not liable because the refuse stuff poured into the sewer above mentioned, was dumped there, not by the city itself, but by certain persons whom the city had licensed to use the sewer in that way. *The city cannot escape in this manner.* If it licensed its property to be used for the purpose indicated, that is, for the dumping of night soil into it, it must see to it that those who use it take such precautions that the use will not be made a nuisance. This is bound to be so on principle. *The city itself could not maintain such a nuisance,* and if it could not, *it clearly has no power to authorize other people to do the same thing.* See Wood on Nuisances, vol. 1, p. 666, vol. 2, p. 1000; 2 Dillon on Mun. Corp. §1048, note." (Italics ours.)

See also:

Cohen v. New York, 113 N. Y. 532.
Speir v. Brooklyn, 18 N. Y. Sup. 170. (Affirmed, 139 N. Y. 6.)
McDonald v. City of Newark, 42 N. J. Eq. 136.
Fitzgerald v. Town of Sharon, 143 Iowa 730.

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Nor is it material that the City itself did not own this dynamite. A *tort feasor* is not excused because he does not own the instrument causing the tort.

In *Pinson v. Young,* 164 Pac. 1102, it is said:

> "Moreover, if it were established that the powder company knowingly aided or abetted Young Bros. in the maintaining of this dangerous nuisance, the company would not be relieved of liability, *even if it did not own the powder* wrongfully or negligently stored in disregard of the public safety or in disregard of the city ordinance. The mere question of ownership of the powder was not primarily important." (Italics ours.)

And so far as this question is concerned, a municipal corporation is subject to the same liability as any other *tort feasor.*

It is No Defense to this Action that the City in Maintaining Buoy No. 1 was Acting in its Governmental Capacity.

The City contends that in maintaining Buoy No. 1 and in issuing a permit, for a consideration, to the agent of the owner of dynamite to store the dynamite at Buoy No. 1, the City was acting in its governmental capacity, and that for acts of negligence in so doing it is not responsible. The trouble with this contention is, that in the first place the City was not acting in its governmental capacity, but in its private proprietary capacity, and, second, that even if it were acting in its governmental capacity, the acts charged against the City, viewed

from the angle now under discussion, were not acts of negligence, but acts of positive wrongdoing. We shall not discuss at this point in which capacity the City was acting, but shall assume that the City was acting in its governmental capacity. The acts charged against the City, however, are not mere acts of non-feasance. They are affirmative acts of wrongdoing. The complaint alleges and the proof shows that the City owned and maintained Buoy No. 1; that this buoy was under the supervision and control of the City and of the Port Warden; that the Port Warden, knowing that the barge had on board fifteen tons of dynamite, nevertheless issued a permit to the Lillico Company to store this dynamite at Buoy No. 1; that by virtue of this permit, the dynamite was stored at Buoy No. 1 for a period of sixteen or seventeen days, and that the storage of this dynamite at the place designated by the Port Warden constituted a violation of the ordinances of the city.

It is to be noted, therefore, that the cause of action now under consideration is not based upon the *failure* to *pass* an ordinance or upon the mere *failure* of the city to *enforce* an ordinance. The gist of this cause of action, therefore, is not negligence, but nuisance. Now, we have demonstrated in the preceding portion of this brief that the act of the City in permitting the storage of the dynamite was a nuisance. But a municipal corporation, acting in any capacity, has no more right to create or maintain or participate in the creation or main-

tenance of a nuisance than has a private individual or corporation; and if a city does create or maintain or participate in the creation or maintenance of a nuisance, it is liable to the same extent and in the same manner as a private individual or corporation.

Such was the law in the time of Lord Hale. In Hargrave's Law Tracts, *pars secundo,* p. 85, it is said:

> "And it would be impossible for the king to license the building of a new wharf or quay, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the port, *for the king cannot license a common nuisance.*"

From that day forth the authorities on this question have spoken with but one voice.

In *Bernstein v. City of Milwaukee,* 158 Wis. 576, 149 N. W. 382, it appears that a child was injured in using a certain apparatus owned and maintained by the city in a playground. The court in that case held that the city in maintaining a playground was performing a governmental duty. Continuing, it said:

> "It has been decided many times in this court that negligence in the performance of a governmental function by the officers or agents of a municipality does not give a right of action. (Citing authorities.)
>
> The exception to this rule is that a municipality may *not maintain a public nuisance,* even when it is performing a governmental duty. Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; Gilluly v. Madison, 63 Wis. 518,

24 N. W. 137, 53 Am. Rep. 299; Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27; and Folk v. Milwaukee, 108 Wis. 359, 84 N. W. 420."

In *Walker v. City of New York,* 107 App. Div. 351, 95 N. Y. Sup. 121, it appears that the City of New York, acting by its common council, issued a permit to certain individuals to give an exhibition of fireworks in a certain portion of the city. An ordinance of the City of New York forbade the discharge of fireworks within that area. During the exhibition Walker was injured. It was contended by the City of New York that there was no liability on the part of the city because the city was acting in its governmental capacity, and that the cause of action alleged against it was its failure to abate a nuisance. The court, however, pointed out the obvious distinction between the liability for failure to abate a nuisance and the liability arising from the creation or maintenance of a nuisance. It said:

"The case of Leonard v. City of Hornellsville, 41 App. Div. 106, 58 N. Y. Supp. 266, cited by appellant as an authority supporting its contention, is not in point. The proposition there declared, that a municipal corporation is not liable for a failure to exercise its charter powers in abating a nuisance upon private property so near the street as to menace the safety of persons lawfully using the highway, is not applicable to the facts established in the case at bar, in which the liability of the city is predicated upon the *affirmative action of defendant in licensing and permitting an act made unlawful by its ordinances, carried out under the supervision of its own officers* in such

> close proximity to a residence street as to constitute a public nuisance, dangerous to the safety of persons lawfully in the vicinity where the exhibition was given, upon business not connected with such exhibition or as voluntary spectators thereof." (Italics ours.)

In *Hart v. Board of Chosen Freeholders of Union County,* 57 N. J. Law 90, the declaration charged a common nuisance, and the court held that the defendant could not escape, even though the nuisance was an indictable offense. It said:

> "We have not been pointed to any precedent extending exemption from liability to cases of *active* wrongdoing, nor are such precedents to be discovered. There is no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury is inflicted by their *wrongful acts,* as distinguished from *mere negligence.* The grounds on which the exemption has been rested in the one class of cases are inapplicable to the other class." (Italics ours.)

In *Hughes v. City of Fond du Lac,* 73 Wis. 381, 41 N. W. 407, the court said:

> "A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual."

Continuing, the court refers to the case of *Weet v. Trustees,* 16 N. Y. 161, which quotes the following passage from *Mayor, etc. v. Furze,* 3 Hill 612:

> " 'This case illustrates another distinction which is directly applicable to the case under consideration. The decision therein is not put exclusively upon the ground of the liability of the corporation for a *mere non-feasance.* The

> facts of the case show that the corporation *had created a nuisance.* They constructed the sewers, the obstruction of which produced the overflow upon the plaintiff's premises. The injury was produced as much by their *positive act* as by their neglect. Under such circumstances, a corporation, whatever may be its nature, is liable to the same extent and upon the same principles as an individual would be for a similar injury'; and finally the court closes the opinion by saying that 'it follows from the preceding reasoning that, if we regard the injury to the plaintiff as the result of mere neglect to keep the highways of the village in repair, the defendants would be responsible in this action for such neglect, upon the ground that their acceptance of the franchise granted by their charter raised an implied undertaking or contract on their part to perform that duty, which, upon the principles referred to, inures to the benefit of every individual interested in such performance. But it is unnecessary to revert to this doctrine to establish the responsibility of the defendants in this cause, for the reason that the injury to the plaintiff was *not* the result of a *mere non-feasance* on the part of the defendants, but was produced by their construction of the platform in question in such a manner as to constitute it a public nuisance.' " (Italics ours.)

In *Fitzgerald v. Town of Sharon*, 143 Iowa 730, the Supreme Court of Iowa said:

> "The creation and maintenance of a nuisance is very clearly not a governmental function, and the authorities are practically of one voice on the subject."

In *Bruhnke v. La Crosse,* 155 Wis. 485, 144 N. W. 1100, the Supreme Court of Wisconsin said:

"When a city creates a nuisance, it is not exercising a governmental function, but is doing something forbidden by law."

The following authorities lay down the same rule:

Hines v. City of Rocky Mount, 162 N. C. 409; 78 S. E. 510.
Markwardt v. Guthrie, 18 Okla. 32; 90 Pac. 26.
Jacobs v. City of Seattle, 93 Wash. 171, 176; 160 Pac. 299.
Harpers v. City of Milwaukee, 30 Wis. 365, 372.
City of New Albany v. Slider, 52 N. E. 626.
Gordon v. Village of Silver Creek, 127 App. Div. 888; 112 N. Y. Sup. 54. (Affirmed, 90 N. E. 1159.)
Seifert v. City of Brooklyn, 101 N. Y. 136.
Nashville v. Mason, 137 Tenn. 169; 192 S. W. 915.
Winchell v. City of Waukesha, 110 Wis. 101; 85 N. W. 668.
Clayton v. City of Henderson, 20 Ky. Law Rep. 87; 44 S. W. 667.
Hines v. City of Nevada, 150 Iowa 620; 130 N. W. 181.
Jones v. Town of North Wilkesboro, 150 N. C. 646; 64 S. E. 866.
Garrett on Nuisances, 3rd ed. p. 131.
McQuillin on Municipal Corporations, §2641, p. 5449, and cases cited.

The cases of *Kitsap County Transportation Co. v. Seattle,* 75 Wash. 673; *Foard v. Maryland,* 219 Fed. 827; and *Fowle v. Common Council of Alexandria,* 3 Pet. 398, relied upon by counsel for the City, are not in point. As we have said, the cause of action in this case is not based upon failure to enforce an ordinance, failure to abate a nuisance,

or failure to pass an ordinance or promulgate regulations. The cause of action stated in each of the three cases just cited was a cause of action for negligence; namely, failure to enforce an ordinance or failure to pass an ordinance.

For instance, in the *Kitsap County Transportation Company* case, 75 Wash. 673, the complaint alleged that an ordinance of the City of Seattle made it unlawful to float saw logs, timbers or piles in the harbor of the city in such manner as to obstruct navigation and that there was a duty imposed upon the Port Warden of exercising vigilant control and supervision over the harbor and the enforcement of all ordinances of the city in relation thereto. The propeller of a steamer owned by Kitsap Transportation Company was injured by striking a floating log deposited in the harbor by the Weymouth Construction Company. The Transportation Company brought suit to recover a judgment against the city for the *failure* of the Port Warden to *enforce* the ordinance. That action was, therefore, one for mere negligence. The city in that case did not issue a permit to the Weymouth Construction Company to violate the ordinance. It did not license the Construction Company to float logs in the bay in such manner as to impede navigation, nor did it know the Construction Company intended so to do. If the facts in that case had been, and the complaint had alleged and the proof had shown, that the city directed the Construction Company to float logs in the manner prohibited by the ordinance, then

an entirely different question would have been presented and the city would have been held liable; for, as stated in the Hart case, 57 N. J. Law 90, there is no "precedent extending exemption from liability to cases of active wrongdoing, nor are such precedents to be discovered."

The case of *Foard v. Maryland,* 219 Fed. 827, cited by the City, so far as it is in point, supports our contention. The facts which gave rise to that decision are as follows: Prior to February, 1911, ships which carried dynamite from Baltimore, took it on board at the railroad piers. The great explosion at Communipaw then took place (The Ingrid, 195 Fed. 596, 598). The municipal authorities of Baltimore then became alarmed, and thereupon insisted that the loading of ships with such explosives should thereafter be done at a greater distance from the city. They named the quarantine anchorage as the place. (213 Fed. 79.) On the morning of March 7, 1913, the British Steamer "Alum Chine" lay at anchor in this quarantine anchorage. It had nearly 300 tons of dynamite on board. A score of men were busy storing the dynamite in the forward hold. About 10:30 an explosion, followed by another, occurred. More than thirty people were killed and a large amount of property damaged. (213 Fed. 53.) It was claimed that the explosion was caused by one Bomhard, a foreman of the stevedores, striking a box of dynamite a hard blow with a bail hook. Thereafter, at least three different suits, in all of which the City of Baltimore was made

a party defendant, were brought. They are as follows: *Zywicki v. Jos. R. Foard Co. etc.,* 206 Fed. 975; *State v. General Stevedoring Co.,* 213 Fed. 51, affirmed 219 Fed. 827, *sub nominee Jos. R. Foard Co. v. State of Maryland;* and *Gutowski v. Mayor, etc., of City of Baltimore,* 127 Md. 502, 96 Atl. 630. In each of these cases it was sought to hold the city either upon the theory (1) that the city was negligent in designating the quarantine anchorage as the place for the handling and transfer of dynamite, or (2) upon the theory that the city should have passed an ordinance prohibiting the use of a bale hook in handling dynamite.

The holding in the case of *Zywicki v. Foard Co.,* 206 Fed. 975, is well stated in the case of *Jolivet v. City of Seattle,* 226 Fed. 963. Judge Neterer there said:

> "In Zywicki v. Foard Co., 206 Fed. 975, the court simply held the City of Baltimore not liable for an injury to a stevedore occasioned through the negligence of a foreman in storing a cargo of dynamite, because of the *failure of the city* to *make regulations* for loading of explosives; it having been given authority to make regulations by the State Legislature." (Italics ours.)

The liability of the city then, in that case, was predicated upon the *failure* to *pass* an ordinance or to *make regulations* concerning the handling of dynamite. Such is not the case here. We say the City enacted a proper ordinance and then violated it.

The holding in the case of *Jos. R. Foard Co. v.*

State of Maryland, 219 Fed. 827, will be found stated at page 834 of that opinion, as follows:

> "Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transshipment of dynamite, in that it was a place frequented by other vessels, and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives from which it derives no profit."

The opinion in the *Jolivet* case would distinguish the case at bar from the *Foard* case by reason of the fact that in the *Foard* case the city derived no profit from furnishing a place for the handling of dynamite, while Judge Neterer held that the City of Seattle in charging one dollar per day for using Buoy No. 1 was a *bailee for hire.* We need not concern ourselves with this distinction now.

The portion of the opinion in the *Foard* case just above quoted shows that the liability in that case was predicated upon the fact that the city had improperly designated a certain place for the handling of dynamite, or that it had failed to pass certain proper regulations to be observed in the handling of dynamite. Again, we say that the cause of action here under discussion is predicated upon the fact that the City did appoint a proper place for

the handling and storage of dynamite, but that instead of requiring the dynamite to be stored at that place it caused or authorized it to be stored elsewhere. The distinction which we are making will be found in the opinion in the case of *Gutowski v. Mayor, etc., of Baltimore,* 127 Md. 502, 96 Atl. 630, 632, where the Supreme Court of Maryland said:

> "Upon the principles applied and illustrated in the cases to which we have referred, it would seem to be clear that damages are not recoverable from the municipality by a person injured in consequence of the violation of a municipal ordinance regulating the movement of explosive substances, *unless the city iself caused or sanctioned the particular conditions or acts which produced the injurious results.* This would certainly be the rule in regard to accidents of that character within the corporate limits, and we find no justification in its charter for imposing a greater or stricter liability upon it with respect to similar occurrences on the waterways beyond its borders which the charter has placed under its control. It is not alleged in this case *that the city authorized or occasioned the dangerous practice* mentioned in the declaration, but the averment is simply that it *neglected to enforce its regulations* prohibiting the employment of such methods. This is not a sufficient basis upon which to charge the city with actionable responsibility for the accident." (Italics ours.)

The case of *Fowle v. Alexandria,* 3 Pet. 398, is also not germane. The point decided in that case is stated in the following headnote:

> "The injury alleged in the declaration being an omission to take a bond required by law and

> the council not being *enabled* or *required* to take it, the action cannot lie."

The complaint in that case, therefore, charged a mere act of non-feasance. The complaint in the case at bar charges mis-feasance or mal-feasance.

The City was Acting in Its Proprietary Capacity.

Throughout all the foregoing argument, we have assumed that the City of Seattle was at no time, in relation to the matters here involved, acting in its private proprietary capacity. We have pointed out, for instance, that Judge Neterer distinguished the facts in the *Jolivet* case from the facts in the *Foard* case for the reason that Baltimore derived no profit from maintaining a place for the handling of dynamite, while the City of Seattle did derive such a profit, and was, therefore, a *bailee for hire.* And was not the City of Seattle a *bailee for hire?* Obviously a toll of one dollar per day for the use of a buoy is not a mere license fee. Such a fee is based upon the expense of issuing the license, and in certain cases on the cost to the City of inspection. The expense of issuing the permit here, however, would be the same whether the vessel was moored to a buoy for one day or for a year. The fee is therefore not based in any degree upon the expense of issuing the license. Moreover, it cannot be argued that the charge of one dollar per day was made to cover the cost of inspection, for there is nothing in the ordinance indicating that the fee is exacted for such purpose, or that it was used for such pur-

pose, or that any such amount was necessary to defray the expense of inspection.

Wisconsin Telephone Co. v. Milwaukee, 126 Wis. 1; 1 L. R. A. (N. S.) 581, 587.

Moreover, there is not a particle of proof in this record that the City performed any act of inspection.

Furthermore, the City does not argue that the fee charged was used or designed to be used to defray the cost of regulation, but it contends that it was acting in its governmental capacity because the income derived from these fees was not sufficient to pay the cost of the up-keep and maintenance of the buoys. This is certainly a most novel argument. If a city engages in the street car business, would it be permitted to deny that in engaging in such business it was acting in its proprietary capacity because, forsooth, the income derived from such business did not equal the cost of operation?

It follows, therefore, from what has just been said, that the City in maintaining these buoys and charging toll for their use was acting in its proprietary capacity and consequently the defense of governmental function is not available to it.

No Act of Congress is Herein Involved.

It is asserted in the brief of the City (page 55) that the City could not and did not exercise any control over the dynamite for the reason that it was "in transit in foreign commerce." We con-

fess that we do not understand this contention. The City has, in another portion of its brief, asserted its right to control and regulate the waters in Seattle harbor. In pursuance of that asserted right, it passed an ordinance providing that dynamite should be handled and stored at the powder dock. Now, it may be assumed for the purpose of this case that the City could not prohibit the Steamer "F. S. Loop" from bringing the dynamite into the harbor of Seattle; but it does not follow that the City does not have the right to say where it shall be stored after it has arrived here. No Act of Congress prohibited the City from designating a place at which dynamite shall be handled or stored. The City of Seattle by ordinance did designate a place for the handling and storing of such explosives and then violated its own ordinance.

A mere perusal of Sections 4278, 4279 and 4280 R. S. will disclose that these sections have no bearing on this case. The Act of Congress of March 4, 1909, (35 St. at L. p. 1135) cited in the case of *The Ingrid,* 195 Fed. 596 (affirmed 216 Fed. 72), is also not germane. The last mentioned Act provides that the Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which regulations "shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives *by land.*" (Italics ours.) But Congress did not give to the Commission any power to regulate the water carriers and no court will hold that such power was "*left out* in *words* to

be *put back* by *construction.*" Moreover, as we shall subsequently see, the reasons which would induce Congress to give to the Interstate Commerce Commission the power to regulate the transportation of explosives by *land* do not exist with reference to explosives transported by *water.*

Nor does the decision in the case of *The Ingrid* have any bearing on the facts in this case. That was a suit against the Central Railroad Company of New Jersey. The facts in that case are that the Du Pont Powder Company shipped 670 cases of dynamite to a shipper at Communipaw, 300 cases of which, however, had been sold to Carlisle, Crocker & Company, of Montevideo, South America. The car containing this dynamite was placed upon the Railroad Company's pier on January 26th. On February 1st work commenced in loading the 300 cases on the steam lighter "Katherine W.", which lighter was then to transport the explosives down the bay and then load them on the steamer "Inveric." Shortly after the work of loading commenced an explosion took place. Where this explosion took place or the cause of it could not subsequently be determined, as all the men engaged in the operation of loading were killed. The Circuit Court of Appeals apparently thought the most probable cause of the explosion was that 100 barrels of black blasting powder, which had been placed on board the "Katherine W." prior to the commencement of the loading of the dynamite, had been set off by a spark. (216 Fed. 75.) At any rate, both the trial court and the appellate court held

that there was no proof in the record which would enable them to determine who was responsible for the explosion. Counsel for libelant then sought to charge the Railroad Company with liability under the rule enunciated in *Fletcher v. Rylands,* L. R. 3 H. L. 330, but both courts repudiated that ruling. At this point we may say that we do not and never have relied on the rule announced in that case.

It was argued in *The Ingrid* case, however, that the Railroad Company was liable in that it had failed to comply with the laws of the State of New Jersey and the ordinances of Jersey City in respect to the *storage* of explosives. The court, however, held that the dynamite was not, under the circumstances of that case, in storage, but that it was in the course of transportation. The facts in the case at bar, however, show that the dynamite was not in transit, but in storage. Moreover, in *The Ingrid* case the court further held that in view of the Act of March 4, 1909, the determination of whether any statute of New Jersey or ordinance of Jersey City applied to the storage or handling of dynamite became immaterial, for the reason that by the passage of the Act, the authority of the local jurisdictions was necessarily excluded. No such question is presented in the case at bar, for, as we have shown, the Act of March 4, 1909, applies only to carriers by land. The reasons which animated Congress in denying to the International Commerce Commission the power to regulate the transportation of explosives by water, clearly appears from these decisions. A carrier by rail is

compelled to transport all dynamite tendered to it for transportation (216 Fed. 78). If Congress, therefore, had not passed the Act of March 4, 1909, "a railway company transporting dynamite over a long railroad system, passing in the trip through various villages, cities and states, would be subject at every stage of the journey to varying local regulations which probably it could not observe." In view of these considerations, it is pre-eminently just that "there should be a central authority, prescribing what the railroad company in the transportation of such explosives, should do." (195 Fed. 602.)

A carrier by water is not compelled to carry dynamite, nor is it subject to a large number of local regulations. There was no reason, therefore, for Congress to provide that a central authority should regulate the transportation of dynamite by water.

Furthermore, in *The Ingrid* case, the trial court found that the place where the dynamite was at the time of the accident was a proper place for its handling. The trial court in this case found that the place where the dynamite was stored was an improper place for its storage, and this being a suit at law, the finding of the trial court is binding upon this court.

Irrespective of Ordinance No. 34379, the City Is Liable.

We have shown, we think, that the City violated Ordinance No. 34379; that in so doing it created a nuisance *per se* for the proximate results of which it is liable in damages. But, even if the City had not passed Ordinance No. 34379, the City would still be liable. The proof shows that Buoy No. 1 was about

twelve or thirteen hundred feet from Harbor Island. (Record, p. 46.) It is asserted in the brief of the City that Harbor Island was unoccupied, but the proof shows that such was not the fact, for the witness Wilman testified that there was a sawmill on Harbor Island. (Record, p. 75.) The testimony also shows that the Centennial Mills and the Albers Mill were about one-half mile from Buoy No. 1 (Record, p. 49) and that the buoy was something over one-half mile from the down-town business section of the City of Seattle. (Record, p. 46.) An examination of the map attached to the bill of exceptions will disclose that the great bulk of the railroad tracks entering the City of Seattle are within a mile of Buoy No. 1.

The lower court in this case held that this dynamite was in storage and not in transit. (Record, p. 84.) Judge Neterer, in distinguishing the facts in the *Joliet* case from the facts in the case of *The Ingvid,* 195 Fed. 596, had made a like finding. The City throughout its brief has asserted that the dynamite was "in transit in foreign commerce." The finding of Judge Neterer, as well as that of the trial judge in this case, however, is obviously correct. It is true that the Port Warden testified that the dynamite, after its arrival here, was to have been transported to Vladivostok by a Japanese boat; that the Japanese boat for some reason could not take it, and that it was then arranged that the "Robert Dollar" should take it. This testimony was, of course, hearsay; but assuming that it states the fact, it does not shows the dynamite was in course of transportation.

The barge containing it had been tied to this buoy for seventeen days. How much longer the dynamite had been in Seattle the evidence does not disclose. Nobody knows when it would have been taken away. The Japanese boat for some reason could not take it; possibly the same reason would operate to prevent the "Robert Dollar" from taking it when the time to take it came. We think, therefore, it cannot be gainsaid that the dynamite was in storage.

Now, Judge Cushman further held that Buoy No. 1 was an improper place to store the dynamite. He said:

> "With regard to the purposes of storage, and *I hold that this dynamite was in storage,* I pause for a moment regarding the several witnesses for defense. The answer of one of them impressed me in just the *conclusion that was forcing itself upon me* during the progress of the trial, that is, in the absence of the control of the section of the ordinance regarding the powder dock, this might not have been an unsuitable place to effect a *transfer* of the powder from one vessel to another. Mr. Griffith asked his own witness the leading question, 'Do you not conclude that this was a safe and suitable place for the *storage* of powder and for its transfer?' That is the substance of it. The witness answered. 'I consider it suitable for its *transfer.*' And Mr. Griffith was not satisfied with that answer and he said, 'And also suitable for its storage?' The witness *hesitated* and answered 'Yes.' *Now, his first answer was the one that impressed me as most reasonable and satisfactory and really the one that his conscience was back of.*" (Record, p. 84.)

The witness referred to was W. C. Dawson, and his testimony is found on page 80 of the Record.

It is noteworthy that the City uses this faltering, hesitating answer of Mr. Dawson—an answer which the court found was not backed up by Dawson's conscience—to bolster up its assertion that the buoy was a safe place for storing dynamite. (Brief, p. 47.)

Now it needs no citation of authority to show that this finding of the *nisi prius* judge, is binding upon this court. The trial court, then, having found that the dynamite was in storage and that Buoy No. 1 was an improper place to store it, it follows that, *irrespective of the ordinance,* the City, in authorizing the dynamite to be stored at Buoy No. 1, was guilty of maintaining a nuisance.

The liability cast upon the defendants in the following cases is *not* based upon the fact that the defendants therein *violated any statute or ordinance.* The ground of decision in each case is that the defendant therein kept, stored or handled explosives in such a place or in such a manner as to constitute a nuisance.

Heeg v. Licht, 80 N. Y. 579.
Wier's Appeal, 74 Penna. 230.
State ex rel. Hopkins v. Excelsior Powder Mfg. Co., 259 Mo. 254; 169 S. W. 267; L. R. A. 1915 A, 615.
Henderson v. Sullivan, 159 Fed. 46; 16 L. R. A. (N. S.) 691.
Schnitzer v. Excelsior Powder Mfg. Co., 160 S. W. 282.
Melker v. City of New York, 190 N. Y. 481; 83 N. E. 565.
Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413; 21 S. E. 1035; 52 Am. St. Rep. 890.

Cheatham v. Shearon, 1 Swan. (Tenn.) 213; 55 Am. Dec. 734.

Viewed from any angle, then, the judgment was right and should be affirmed.

Respectfully submitted,

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